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LAW OFFICES
GINSBURG, FELDMAN AND BRESS
CHARTERED
1250 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036
TELEPHONE (202) 637-9000

CORRESPONDENT OFFICE
9, RUE BOISSY D'ANGLAS
75008 PARIS, FRANCE

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

HENRY M. RIVERA
(202) 637-9012

TELECOPIER (202) 637-9195
TELEX 4938614

March 18, 1993

HAND DELIVERED
Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Notice - MM Docket 92-265, MM Docket 92-266 File No. W-PC6836

LIBERTY CABLE COMPANY, INC.
PETER O. PRICE, PRESIDENT
575 Madison Avenue
New York, NY 10022
212-891-7771

PROGRAMMING ACCESS RULEMAKING

MM DOCKET 92-265

DISCRIMINATION EXISTS IN DISTRIBUTION OF VIDEO PROGRAMMING

- EXPRESS FACILITIES-BASED DISCRIMINATION
  - Liberty and other SMATV operators pay higher prices than cable operators with same number of subscribers.
  - Liberty and other SMATV operators fail to receive marketing support offered to cable operators.
    = Discounts for new subscribers during incentive sales periods.
    = Credits against fees spent on advertising.
- IMPLICIT FACILITIES-BASED DISCRIMINATION
  - Overbuild policies: refusal by programmers to sell programming until 60 days after any overbuild of existing system - cable is always the existing system.
  - Exclusive contracts - none exist with non-cable technologies.
- EXCLUSIVE CONTRACTS
  - Cable says designed to encourage carriage of new programming.
  - However, Time Warner asserts exclusivity over long established services.
  - Even new services Time Warner offers to MVPDs everywhere except in NYC.
- DISCRIMINATION IS CAUSED BY CABLE OPERATORS EXERTING PRESSURE ON <u>ALL</u> PROGRAMMERS REGARDLESS OF WHETHER THE PROGRAMMER IS OWNED BY A CABLE OPERATOR.

REGULATIONS

- DETAILED GOVERNMENT REGULATION IMPOSSIBLE
  - Herculean task.
- INSTEAD ADOPT REBUTTABLE PRESUMPTION OF ILLEGALITY FOR BOTH FACILITIES-BASED DISCRIMINATION AND EXCLUSIVE CONTRACTS.
  - Applicable to any express or implicit "facilities-based" discrimination in price, availability or other term or condition of programming.
  - Applicable to any exclusive contract to which cable operator is party or which benefits cable operator.
- TO OVERCOME PRESUMPTION, PROPONENT MUST SHOW DISCRIMINATION OR CONTRACT PROMOTES "EFFECTIVE COMPETITION."
  - Must show promotes "effective competition" as that term defined in rate regulation section of act, Section 623(l)(1).
  - Must make showing for all affected areas (areas served by adversely affected MVPDs).
  - If affected area already has "effective competition," must show that discrimination or contract ensures continuation of "effective competition."

ENFORCEMENT

- PROGRAMMER MAY ASK FOR DECLARATION OF LEGALITY
  - Within sixty days of start of presumptively illegal discrimination or exclusive contract.
  - For discrimination and contracts currently in effect, within sixty days of adoption of programming access rules.
  - Affected MVPDs served and have opportunity to respond.

- MVPD MAY ASK FOR DECLARATION OF ILLEGALITY
  - At any time.
  - By pleading, on good faith belief, sufficient facts to show a presumption of illegality.
  - No actual injury required to be shown.
  - Programmer responds and attempts to show discrimination or exclusive contract promotes "effective competition."

- FCC ORDERS COMPLIANCE AND ISSUES FORFEITURE

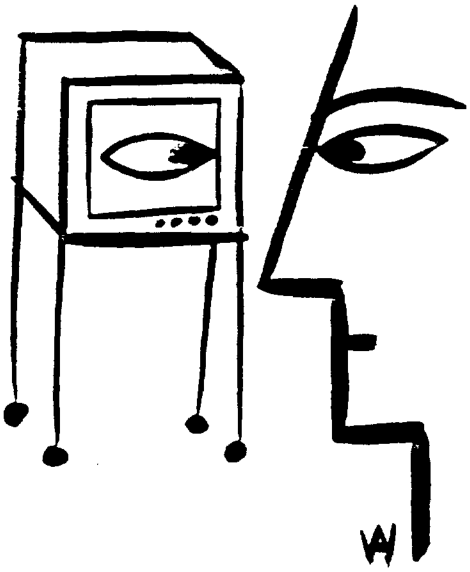
THE NEW YORKER

MARCH 15, 1993
ANNALS OF COMMUNICATIONS

CHANGING CHANNELS

While NBC and ABC grapple with management successions, mergers, and Mike Ovitz as producer, a new form of cable threatens to change the rules.

BY KEN AULETTA



FINALLY, there is the tale of a gnat driving a giant crazy. Little more than a year ago, companies that wished to use super-high radio frequencies were granted permission by the Federal Communications Commission to transmit television signals. Instead of having to dig up streets and construct expensive wire highways into separate homes, as cable companies have done, they could just pick a satellite, find a tall building, put a fourteen-foot satellite dish on top of it to receive microwave signals, and bounce the microwaves to three-foot dishes on other roofs. Enter Liberty Cable Television, a company owned by the real-estate and banking interests of the Milstein family and now aggressively marketed by the former New York *Post* publisher Peter O. Price.

Such a system of delivering television signals is not new, but before the F.C.C. ruling it could be used only to deliver signals to a single building, and not to bounce them from one building to another. In the year since the ruling went into effect, Price says, Liberty has signed up twelve thousand customers in Manhattan and is averaging two thousand new customers a month. The prize is the half-million cable customers who now subscribe to one of two Time-Warner cable systems, Manhattan and Paragon Cable. "We are now competing directly with Time-Warner," Price says. "We should be able to get from fifteen to twenty per cent of the market in Manhattan. And, given the rage at cable, we could get more."

Liberty's sales pitch is simple: If you're mad as hell and want to save money, sock it to the giant. Liberty offers up to seventy-three channel choices and a monthly charge that is a third to half as expensive as regular cable, and there is no installation charge, no matter how many TV sets in an apartment are hooked up. Liberty mounts its three-foot dish on the roof to receive the signal, then sends it down the existing wires owned by the building. The catch is that the entire building must agree to sign up with Liberty.

Just over a year ago, Richard Aurelio, the man who built the Time-Warner cable business in New York, characterized Liberty by telling the *Times*, "They're of no concern to me." Yet last month Time-Warner Cable mailed a blue-and-white flyer with the heading "Here's What You *Lose* If You Switch From Time-Warner Cable to Liberty Cable." The flyer listed seven things, including a few channel choices not available on Liberty. Today, Aurelio refers to Liberty as a "pimple."

Time-Warner is more worried, however, about a pending partnership between Liberty and the New York Telephone Company, which has a hundred and ten thousand miles of fibre-optic cable installed in the metropolitan area. Liberty could use the telephone company's cables and sophisticated switching devices to offer customers what Liberty calls a video-dial-tone service. If this service is installed by the fall, as it can be, viewers might have to change the way they think of everything from channel choices to newspapers. A vast push-button video vault will contain not only any channel but any movie, sitcom, newspaper, book, or data.

Price has had conversations with both the *Times* and the *Wall Street Journal* about using Liberty in a pilot project to distribute the newspapers through the TV set. Mindful that newsprint represents the second-largest cost item at a newspaper—after payroll—Price is eager to promote the prospect of publishing a paperless newspaper. Don't want to hustle to a newsstand at 10:40 P.M. for an early edition of the next day's paper? You can get the paper with a click of your re-

Price wants to create separate Bergdorf Goodman and F. A. O. Schwarz channels, enabling people to shop at home. He is close to an agreement with Cap Cities/ABC, and dreams of offering Peter Jennings' "World News Tonight" or ESPN sports on demand. He says he will soon announce agreements with Lincoln Center to offer live concerts, plays, and operas; with public television to offer "The MacNeil/Lehrer NewsHour"; and with the Port Authority to display airline departure and arrival times and bridge-and-tunnel-traffic reports.

But there are more than a few obstacles. Price needs federal approval to link up with the telephone company, and both Time-Warner and the City of New York have petitioned the government to reject his application. "They're masquerading behind talk of a 'video dial tone' to provide cable service without a franchise," Richard Aurelio says. William F. Squadron, New York City's Commissioner of the Department of Telecommunications and Energy, now welcomes Liberty, because it creates competition with cable, but would not welcome the joining of Liberty and the telephone company. He charges that Liberty seeks to "evade the law," which requires cable-service providers to pay a five-per-cent franchise fee to the city.

One other obstacle: neither the *Times* nor the *Wall Street Journal* has officially signed on. "We're going to try and do some stuff for him," Michael Connor, the director of television development for Dow Jones & Co., which owns the *Journal*, says of Price. "We really haven't figured it out yet." A management figure at the *Times* who has been involved in the discussions says a deal is not imminent, but he adds, "Will we do something with Liberty Cable? I hope so."

Whatever happens—whether the giant swats the gnat or not—Liberty Cable offers an apt metaphor for what is going on in the worlds of communications and of business. The entrepreneur who travels light often outmaneuvers the giant, as

THEY'RE DOING IT AGAIN!

In the face of rising consumer dissatisfaction, Time Warner Cable of New York City (including Manhattan Cable and Paragon), just announced their third price increase in two years. How can they demand more money for less service?

Switch to Liberty Cable,

New York's New Cable Company.

Better Building-Wide Service At Half The Price.